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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THOMAS E. PEREZ, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

LANTERN LIGHT CORPORATION, d/b/a
ADVANCED INFORMATION SYSTEMS, a
corporation; DIRECTV LLC, a limited
liability company; and RAMON MARTINEZ,
an individual,

Defendants.

Case No.: 2:12-cv-01406-RSM

**PLAINTIFF’S MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST
DEFENDANT DIRECTV LLC**

ORAL ARGUMENT REQUESTED

Noting date: April 10, 2015

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1 **I. INTRODUCTION**

2 Plaintiff Thomas E. Perez, Secretary of Labor, United States Department of Labor
 3 (“Secretary”), pursuant to Federal Rule of Civil Procedure 56, hereby moves the Court to find, as
 4 a matter of law, that Defendant DirecTV LLC (“DirecTV”) was an employer of the satellite
 5 television installers (“Installers”) at issue in this case. The Fair Labor Standards Act of 1938, 29
 6 U.S.C. §§ 201 *et seq.* (“FLSA” or “the Act”) defines employment broadly to further the reach of
 7 the Act’s workplace protections, and there is no genuine dispute that DirecTV meets that
 8 expansive definition in this action. The Installers at Lantern Light Corporation, d/b/a Advanced
 9 Information Systems (“AIS”) were economically dependent on DirecTV, because the contract
 10 between DirecTV and AIS required that Installers work exclusively for DirecTV – leaving
 11 DirecTV as AIS’s only source of income and work. This dependence enabled DirecTV to have
 12 pervasive control over every aspect of the Installers employment: DirecTV imposed Installer
 13 hiring and eligibility requirements, set work schedules, directed and monitored the Installers’
 14 work, and enforced performance standards through bonuses and discipline. DirecTV even
 15 dictated Installers’ appearance, the quality of the vehicles they drove, and the length of
 16 conversation Installers had to have with DirecTV customers during the installation. Since the
 17 Installers worked exclusively for DirecTV, DirecTV effectively capped Installer pay based on
 18 the rates they were willing to pay for each installation. As a matter of economic reality, AIS
 19 served as nothing more than a labor contractor for DirecTV supplying manpower to perform
 20 DirecTV work under DirecTV control.

21 DirecTV had all the benefits of an employer, being able to tell Installers what to wear,
 22 where to go, and what to do, and holding out the Installers as employees to DirecTV customers.
 23 It also had the power of an employer to set rates, track employee performance and hours worked.
 24 DirecTV treated Installers at AIS as DirecTV employees, without accepting responsibility to
 25 ensure the Installers were paid the wages required by the FLSA. DirecTV was the entity with the
 26 power over the workplace to remedy violations of the FLSA, but it chose instead to continue
 27 using the Installers as contract labor because it was cheaper to do so.

1 The Secretary seeks summary adjudication so that the Court may end this subterfuge and
 2 recognize, as a matter of law, that the ubiquitous control exercised by DirecTV rendered the
 3 company a joint employer of the Installers at AIS. As an employer of the Installers, DirecTV is
 4 jointly responsible for compliance with all provisions of the FLSA, and jointly and severally
 5 liable, along with Defendants Lantern Light Corporation, d/b/a Advanced Information Systems
 6 (“AIS”) and Ramon Martinez, for all back wages found due.

7 **II. UNDISPUTED MATERIAL FACTS**

8 The undisputed material facts demonstrate the control DirecTV exercised over the
 9 Installers in all facets of the employer-employee relationship.

10 **A. Installers at AIS worked exclusively for DirecTV**

11 DirecTV used its own employee installers, and Installers at AIS, to perform installation
 12 and upgrade services in the Seattle area during the relevant time period. Exhibit A to
 13 Declaration of Joseph Lake in Support of Plaintiff’s Motion for Partial Summary Judgment, *filed*
 14 *concurrently herewith* (“Ex.”), Transcript of Deposition of Steven Crawford as DirecTV’s
 15 person most knowledgeable, pursuant to Rule (30)(b)(6)(“30(b)(6) Depo”) at 27:15-21.

16 The contract between AIS and DirecTV mandated that AIS not provide services to any
 17 other television providers. Ex. B, DirecTV, Inc. Services Provider Agreement (“DirecTV
 18 Contract”) at DTV000289-290.¹ As a result, AIS earned over ninety-nine percent of its revenue
 19 from DirecTV. Ex. D, AIS’s Fourth Amended Answers to the Secretary’s Interrogatories (First
 20 Set) at 20, 23 (From August 21, 2009, through October 24, 2013, DirecTV provided 99.67% of
 21 AIS’s revenue). Installers worked at AIS on an indefinite full-time basis exclusively for
 22 DirecTV until October 2014, when AIS closed down, and the Installers moved over to another
 23

24 ¹ The DirecTV Contract was entered into by DirecTV and AIS’s predecessor, Lumin, Inc.
 25 effective August 3, 2009. Ex. B, DirecTV Contract at DTV000283. On January 17, 2011, AIS
 26 signed an “Assumption Agreement,” stepping into its predecessor’s shoes, and assuming all
 27 rights, obligations, and liabilities under the DirecTV Contract. Ex. C, Assumption Agreement,
 DTV 000043-44.

entity, Next Solutions, to continue working exclusively for DirecTV. Ex. E, E-mail exchange dated October 10-13, 2014, DTV e0200777 (DirecTV management describing changeover of Installers to Next Solutions); Ex. F, Transcript of Deposition of Marc Mastin (“Mastin Depo”) at 89:10-22. DirecTV management deemed this “just operating under a different name,” and there is no evidence of any change in the relationship between the Installers and DirecTV since they moved over to Next Solutions. Ex. E, E-mail exchange dated October 10-13, 2014, DTV e0200777.

B. DirecTV controlled Installers’ work throughout their workday

DirecTV supplied Installers all of their work, and instructed Installers how that work was to be performed. Each day, DirecTV assigned Work Orders to Installers with the tasks to be performed at each DirecTV customer’s home. *See, e.g.*, Ex. G, Work Order, dated December 6, 2012, DOL 003498. These Work Orders were assigned to specific Installers, and AIS had to receive DirecTV approval before re-assigning any Work Order to a different Installer. *See, e.g.*, Ex. H, E-mail exchange dated November 4, 2011, DTV e0143795-796 (AIS requesting Work Order be moved to different Installer and follow-up on that request); Ex. I, Transcript of Deposition of Joshua Guttormsen (“Guttormsen Depo”) at 47:1-48:7.

The Work Orders assigned by DirecTV to Installers had to be performed during specified time windows in the morning, afternoon, and evening. *See, e.g.*, Ex. G, Work Order, DOL 003498 (afternoon window). Since the appointment window for morning Work Orders began at 8 a.m., DirecTV required Installers to be at their first Work Order by 8 a.m. Ex. F, Mastin Depo at 27:1-14; *and* Ex. J, E-mail exchange dated November 10-13, 2013, DTV e0172877-e0172879, (DirecTV “expectation is 8:00am, just as it is for...in-house teams.”). DirecTV also had to approve any time off for an Installer. Ex. I, Guttormsen Depo at 38:7-39:13. In addition, during the summer, DirecTV required AIS to have Installers available for appointments from 4 p.m. to 8 p.m. Ex. K, Transcript of Deposition of David Baker (“Baker Depo”) at 56:24-57:15. Also, when DirecTV was experiencing a large volume of business, it required Installers’ go from five

1 days per week of work to six days per week. *See* Ex. L, E-mail dated July 1, 2011,
 2 DTVe0128506 (DirecTV Regional Director Marc Mastin ordering schedule increase).

3 DirecTV imposed exhaustive procedures that Installers had to follow in carrying out their
 4 duties. *See* Ex. M, DirecTV Field Services Standard Professional Installation Guidelines and
 5 Installation & Customer Service Manual (“DirecTV Installer Manual”), DTV004202-4239; *and*
 6 Ex. B, DirecTV Contract at DTV000307-309, Personnel, Vehicles, and Uniforms. DirecTV
 7 rules required Installers contact DirecTV dispatch each time the Installer arrived and departed
 8 the DirecTV customer’s home. *See* Ex. M, DirecTV Installer Manual at DTV004206; Ex. N,
 9 Transcript of Deposition of Chris King (“King Depo”) at 50:23-51:4; Ex. F, Mastin Depo at
 10 20:9-23:9. DirecTV also mandated the way Installers looked and interacted with customers
 11 down to exacting detail – requiring, for example, that Installers spend a minimum of twenty
 12 minutes educating customers on the DirecTV equipment. *See* Ex. M, DirecTV Installer Manual
 13 at DTV004208; Ex. B, DirecTV Contract at DTV000299.

14 DirecTV also provided regular direction to AIS on how many Installers should be
 15 working at AIS – indirectly by the amount of Work Orders assigned by DirecTV, and directly by
 16 telling AIS when it was overstaffed and understaffed on Installers. *See, e.g.*, Ex. O, E-mail
 17 Exchange dated November 17, 2012, DOL Martinez 0025-27 (DirecTV management reminding
 18 AIS that AIS was overstaffed and needed to only be “13-15 strong performers); Ex. P, E-mail
 19 exchange dated April 15, 2014, DTV e0172479-172480 (DirecTV Regional Director Marc
 20 Mastin directing AIS to increase Installer staffing from twenty to thirty individuals).

21 **C. DirecTV monitored and enforced Installer performance**

22 DirecTV monitored Installers on a day-to-day basis to evaluate how they were
 23 performing the Work Orders assigned to them by DirecTV. *See, e.g.*, Ex. G, Work Order, DOL
 24 003498. This included statistically reviewing Installers on over twenty metrics – including
 25 customer satisfaction, whether the Installer properly identified himself as being with DirecTV,
 26 and if follow-up work was required by another installer. *See, e.g.*, Ex. Q, Customer Satisfaction
 27 Rates for Week Ending 02/27/2012, DOL 002807 (Weekly report with columns evaluating

1 overall “Index” score and whether Installer “Showed Picture ID”); *and* Ex. R, Spreadsheet report
 2 of installer performance from June 2012 to May 2013, produced by DirecTV, DTV 000276.²

3 DirecTV used this metric data to supervise Installer performance in various ways.
 4 DirecTV management communicated regularly with AIS management about Installer
 5 performance. *See, e.g.*, Ex. S, E-mail dated July 30, 2013, DTV e0172820 (DirecTV Regional
 6 Director Marc Mastin telling AIS that Installer performance on a metric called NCKK was “so
 7 sub-par they are currently costing me money”). DirecTV also refused to provide Work Orders to
 8 Installers who did not meet DirecTV’s performance expectations. Ex. F, Mastin Depo at 56:22-
 9 58:21; 59:12-61:22.

10 DirecTV also regulated Installer performance through bonuses, penalties and fines.
 11 DirecTV charged AIS fines on a weekly basis when Installers failed to meet DirecTV’s
 12 standards. Ex. B, DirecTV Contract at DTV000317-319, Performance Standards/ Chargebacks/
 13 Incentives. DirecTV additionally provided incentives AIS for Installers to meet certain
 14 objectives. *See, e.g.*, Ex. T, Letter from DirecTV to “Contracting Partner,” dated March 5, 2012,
 15 DOL 001528 (Outlining “incentive plan to reward excellent customer service as measured by the
 16 post call survey results.”). DirecTV’s close supervision of the Installers also impacted firing,
 17 because AIS relied on DirecTV’s metric data when deciding whether to fire an Installer. *See* Ex.
 18 U, Transcript of Deposition of Ramon Martinez as AIS’s person most knowledgeable pursuant to
 19 Rule 30(b)(6) (“Martinez Depo”) at 27:9-11.

20 ///

21 ///

22 _____
 23 ² “Tech ID” is the individual number assigned to each Installer by DirecTV. Among the
 24 numerous metrics, “SIN7” rate refers to percentage of Work Orders by an Installer that required
 25 DirecTV to perform follow-up service within seven days. Ex. A, 30(b)(6) Depo at 38:13-20.
 26 “OTG” rate refers to the percentage of Work Orders when an Installer failed to arrive in the
 27 scheduled appointment window (did not comply with DirecTV’s On Time Guarantee). *Id.* at
 38:25-39:18. “DPP Sold” and “DPP Eligible” refer to the number of DirecTV Protection Plans
 sold by the Installers to eligible customers. *Id.* at 40:2-6.

D. DirecTV maintained power over Installer pay

DirecTV set a piece rate it paid AIS for Installers to complete certain tasks, such as installing DirecTV equipment, selling protection plans, and upgrading a customer's television programming. *See* Ex. B, DirecTV Contract at DTV000321, Rate Card, effective July 4, 2009; *see also* Ex. V, Rate Card, undated, DOL 001530; *and* Ex. W, Addendum to DirecTV Services Provider Agreement, DOL Martinez 0013-15 (Detailing amounts DirecTV will pay to AIS for selling each protection plan). Because Direct TV was the only source of income for Installers, these rates effectively capped the pay that AIS could pay its Installers.

AIS used the money from DirecTV to cover overhead and profits, with the remainder going to the Installers as a piece rate for each completed task. "own rate card with DirecTV that pays us specific amounts for specific tasks...[AIS takes] the rate card and we decide what percentage we can afford to pay our technicians." Ex. U, Martinez Depo at 98:7-24. Since DirecTV was the only source of money for DirecTV, AIS could not pay Installers any more than DirecTV was paid by AIS. Neither AIS nor DirecTV adjusted the amount paid to Installers to factor in how long a task actually took, or provide any compensation when an Installer attempted to, but was unable to complete a task. Ex. B, DirecTV Contract at DTV 000287 (AIS "not entitled to any payment for [Work Orders] not completed for any reason, including a cancellation by the DirecTV customer at the door"); Ex. K, Baker Depo at 34:10-36:17; Ex. U, Martinez Depo 98:7-99:13.

AIS offered financial incentives to Installers on the same measures for which DirecTV offered incentives to AIS. *See* Ex. W, E-mail dated January 23, 2013, DOL 004832 (AIS Operations Manager Justin Masencup outlining how much Installers earned in the month to date by performing well on DirecTV's customer satisfaction survey); *and* Ex. X, E-mail dated July 13, 2011, DOL 004790 (AIS Controller Lisa Kelly detailing bonus to Installers for selling protection plans). So when AIS received bonus money from DirecTV, AIS passed a percentage of that money down to the Installers. Accordingly, as to pay and the other traditional functions of

1 an employer, the facts are not disputed which establish that DirecTV exercised authority over the
2 Installers.

3 **E. DirecTV imposed Installer hiring requirements**

4 To be eligible to work as an Installer at AIS and receive work from DirecTV, an
5 applicant must satisfy multiple pre-requisites imposed by DirecTV. First, DirecTV required each
6 installer applicant to pass drug and background checks performed by a vendor approved by
7 DirecTV. *See* Ex. U, Martinez Depo at 44:11-18; Ex. B, DirecTV Contract at DTV000307.
8 Second, DirecTV required that every installer undergo training and receive two certifications
9 related to installing DirecTV satellite equipment. Ex. U, Martinez Depo at 39:23-40:20 *and*
10 42:12-22; Ex. N, King Depo at 74:24-75:4. These screening, certification and training
11 requirements were the only pre-requisites to working as an Installer at AIS and receive work
12 from DirecTV, and all of these requirements came from DirecTV.

13 **III. ARGUMENT**

14 **A. Standard of review**

15 A motion for summary judgment should be granted if there is no genuine dispute as to
16 any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.P.
17 56(a). A factual dispute is genuine if there is sufficient evidence for a reasonable fact finder to
18 find for the non-moving party, while a fact is material if it “might affect the outcome of the suit
19 under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When the
20 party moving for summary judgment would bear the burden of proof at trial, “the moving party
21 has the initial burden of establishing the absence of a genuine issue of fact on each issue material
22 to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir.
23 2000). Once the moving party satisfies this burden, summary judgment should be granted unless
24 the opposing party produces specific facts showing there is a genuine dispute for trial. *Celotex*
25 *Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

26 The opposing party may not rest on mere allegations or denials from the pleadings, but
27 instead must demonstrate by affidavits or other materials in the record that there is a genuine

1 dispute for trial. *See* Fed. R. Civ. P. 56(c)(1); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475
 2 U.S. 574, 586 (1986); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1048 (9th Cir. 1995).
 3 Although the court must draw “all reasonable inferences supported by the evidence” in favor of
 4 the non-moving party, *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002),
 5 the opposition “must do more than simply show that there is some metaphysical doubt as to the
 6 material facts,” *Matsushita Elec. Indus. Co.*, 475 U.S. at 588. A mere “scintilla of evidence” in
 7 support of the nonmoving party’s position—or evidence that is “merely colorable” or “not
 8 significantly probative”—is insufficient to defeat summary judgment. *Anderson*, 477 U.S. at
 9 249-50, 252; *Rogan v. City of Boston*, 267 F.3d 24, 27 (1st Cir. 2001) (“conclusory allegations,
 10 empty rhetoric, unsupported speculation, or evidence which, in the aggregate, is less than
 11 significantly probative” is insufficient to defeat summary judgment). “Where the record taken as
 12 a whole could not lead a rational trier of fact to find for the non-moving party” on a particular
 13 issue, there is no genuine dispute for trial. *Matsushita*, 475 U.S. at 587. Here, there is no
 14 genuine dispute of any of the material facts necessary to establish DirecTV jointly employed the
 15 Installers.

16 **B. The FLSA broadly defines employment**

17 The FLSA defines an “employee” as “any individual employed by an employer,” and
 18 “employer” as “any person acting directly or indirectly in the interest of an employer in relation
 19 to an employee.” 29 U.S.C. §§ 203(d) and 203(e)(1). The Act further defines “employ” to
 20 “include[] to suffer or permit to work.” 29 U.S.C. § 203(g)). The FLSA’s definition of
 21 “employee” is “‘the broadest definition that has ever been included in any one act.’” *U.S. v.*
 22 *Rosenwasser*, 323 U.S. 360, 363 n. 3 (1945) (*quoting* 81 Cong. Rec. 7657 (statement of Senator
 23 Black)); *see Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (“employ” is defined
 24 with “striking breadth”). “The definition of ‘employer’ under the FLSA is not limited by the
 25 common law concept of ‘employer,’ and is to be given an expansive interpretation in order to
 26 effectuate the FLSA’s broad remedial purposes.” *Bonnette v. California Health & Welfare*
 27 *Agency*, 704 F. 2d 1465, 1469 (9th Cir. 1983). Congress’s intent in creating such broad

1 definitions was to ensure the Act's scope of coverage is broad. *See Rosenwasser*, 323 U.S. at
 2 362-63. Accordingly, the Supreme Court "has consistently construed the Act 'liberally to apply
 3 to the furthest reaches consistent with congressional direction,' recognizing that broad coverage
 4 is essential to accomplish the [Act's] goal" *Tony & Susan Alamo Found. v. Sec'y of Labor*,
 5 471 U.S. 290, 296 (1985).

6 The Ninth Circuit "has recognized that the concept of joint employment should be
 7 defined expansively under the FLSA." *Torres-Lopez v. May*, 111 F. 3d 633, 639 (9th Cir. 1997).
 8 While the Ninth Circuit has enunciated many factors which may assist in analyzing "the total
 9 employment situation and the economic realities of the work relationship," the overarching focus
 10 of the inquiry is economic dependence" of the worker on the alleged employer. *Bonnette*, 704 F.
 11 2d at 1470; *see also* 29 C.F.R. § 791.2; *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1312
 12 (11th Cir. 2013).

13 **C. As a matter of law, DirecTV jointly employed the Installers**

14 Direct TV exercised control over Installers' employees' wages, hours, appearance and
 15 working conditions. Accordingly, the factors analyzed by Courts to determine joint
 16 employment, as well as the broader question of economic dependence, demonstrate that DirecTV
 17 jointly employed the Installers at AIS.

18 The Installers were akin to the farmworkers in *Torres-Lopez*. *Torres-Lopez*, 111 F.3d at
 19 633. In that case, cucumber grower Bear Creek Farms contracted with a farm labor contractor to
 20 supply farmworkers to harvest Bear Creek Farms' cucumber crop. *Id.* at 637. The farmworkers
 21 worked only for Bear Creek Farms, and were paid a piece rate by the farm labor contractor from
 22 the monies paid to the contractor by Bear Creek Farms. *Id.* Bear Creek Farms determined when
 23 the farmworkers began harvesting, what days they worked, and how many farmworkers were
 24 needed. *Id.* at 642. In addition, Bear Creek Farms management was present in the fields each
 25 day supervising the performance of the farmworkers. *Id.* Considering "all those factors which
 26 are 'relevant to [the] particular situation' in evaluating the 'economic reality' of an alleged joint
 27 employment relationship," the Ninth Circuit recognized that the farm labor contractor was no

1 more than a middleman finding manpower for Bear Creek Farms, and held that Bear Creek
 2 Farms jointly employed the farmworkers. *Id.* at 645. Relying on the factors outlined by the
 3 *Torres-Lopez* court, it is clear that AIS served a similar function as the farm labor contractor
 4 while DirecTV possessed and exercised the control of an employer over the Installers.

5 *1. DirecTV directed and controlled the conditions of Installer employment*

6 There is no genuine dispute that DirecTV exercised substantial control of the day-to-day
 7 work of Installers. Evidence that a company can direct, control, or supervise the work performed
 8 by a group of workers weighs in favor of finding joint employment under the FLSA. *Bonnette*,
 9 704 F. 2d at 1470; *see Torres-Lopez*, 111 F.3d at 642. DirecTV mandated how Installers
 10 performed their work, closely supervised Installer performance, and directed where Installers
 11 would perform their work.

12 *a. DirecTV constantly monitored Installer compliance and performance*

13 It is undisputed that DirecTV ensured AIS and the Installers adhered to DirecTV's
 14 standards by micromanaging Installers through meticulous tracking and ongoing supervision of
 15 their performance at AIS. DirecTV used this information to enforce compliance by Installers
 16 with DirecTV's expectations.

17 DirecTV was constantly gathering data on Installer performance across over twenty
 18 metrics. DirecTV used numerous means to gather this data. To track when Installers arrived and
 19 departed from a jobsite, DirecTV required the Installers check in with DirecTV dispatchers on
 20 every Work Order. Ex. M, DirecTV Installer Manual at DTV004206; Ex. N, King Depo at
 21 50:23-51:4; Ex. F, Mastin Depo at 20:9-23:9. DirecTV also contacted the customer after the
 22 work was done to ask for their opinion on the Installer's work, and to determine whether the
 23 Installer followed the required protocol, such as showing their ID badge. Ex. K, Baker Depo at
 24 51:4-14 *and* 58:3-16; Ex. Q, Customer Satisfaction Rates for Week Ending 02/27/2012, DOL
 25 002807. DirecTV additionally evaluated the quality of work by determining whether the
 26 DirecTV equipment was operating as expected. So, for example, if DirecTV had to send a
 27 technician out to service the satellite dish within seven or thirty days after an Installer installed it

(the “SIN7” and “SIN30” metric), that reflected negatively on the Installer’s performance. Ex. A, 30(b)(6) Depo at 38:13-20; Ex. B, DirecTV Contract at DTV000317; Ex. Y, E-mail exchange dated April 6-7, 2014, DTV e0172475 (DirecTV criticizing Installers on these metrics).

DirecTV reviewed Installer performance on these metrics with AIS on an ongoing basis. First, DirecTV management met with AIS management on a weekly or bi-weekly basis to discuss how Installers were doing. Ex. Z, E-mail dated March 13, 2012, DTV e0172078 (meeting reminder between DirecTV Regional Director and AIS management); Ex. F, Mastin Depo 14:5-16:13. In addition, DirecTV management sent constant e-mails to AIS about how Installers were doing. A few examples from the e-mails turned over by DirecTV in discovery include:

- DirecTV Regional Director Marc Mastin, upset with Installer performance on the SIN 30 metric, stated, in an e-mail to AIS President Ramon Martinez, that “I sent a note a little over a weeks ago and you said you got it...Now you are worse than you were. I don’t want to hear it, I want to see it in results. Make it happen!” According to Mastin, “[t]here’s a problem that needs to be addressed and it’s impacting our customers.” Ex. Y, E-mail exchange dated April 6-7, 2014, DTV e0172475.
- In another e-mail to Martinez, Mastin was unhappy with the “Net Promoter Score” Installers were receiving from DirecTV customers. To determine this score, DirecTV asked customers whether they would recommend DirecTV to others. Mastin started the e-mail by telling Martinez that he “can’t begin to explain how frustrating [AIS’s score] is.” Ex. AA, E-mail dated December 2, 2013, DTV e0172823. Mastin made clear that he “will be evaluating this very closely in the weeks to come and looking for DRASTIC improvement.” *Id.*
- DirecTV also monitored whether Installers arrived at their first assignment by 8 a.m., and when Mastin felt Installers at AIS were arriving late too often, he e-mailed AIS management to made clear to Martinez, in an e-mail that the “expectation is 8:00am, just as it is for [DirecTV] in-house teams. This has to be corrected immediately without

exception.” Ex. J, E-mail exchange dated November 10-13, 2013, DTV e0172877-e0172879; Ex. F, Mastin Depo at 27:1-14.

- DirecTV tracked Installer productivity, and Mastin told AIS that it was “completely disappointing” that Installers at AIS were only closing 2.3 Work Orders per day, compared to 3.3 Work Orders per day by DirecTV’s in-house installers. Ex. BB, E-mail exchange dated September 6, 2013, DOL Martinez 0048-49. Mastin stated that he “will do a 30 day review” starting immediately, and consider giving no more work to AIS if productivity did not improve. *Id.*

There can be no genuine dispute that DirecTV was doing much more than simply sending work to AIS and hoping Installers completed it according to DirecTV guidelines. DirecTV was conducting ongoing supervision of the Installers as if they were DirecTV employees by closely and constantly tracking their performance, and making clear through frequent communication to AIS how DirecTV perceived Installers were doing their work.

In *Carrillo v. Schneider Logistics Trans-Loading & Distribution, Inc.*, 2:11-CV-8557, 2014 WL 183956 (C.D. Cal. Jan. 14, 2014), Walmart sought summary judgment that it did not jointly employ individuals who worked in warehouses that received imported merchandise and shipped that merchandise to regional distribution centers. *Carillo*, 2014 WL 183956, at *1. The Central District Court of California denied summary judgment in part, because of “Walmart’s extensive oversight and enforcement of its own guidelines and standards,” including tracking worker productivity and auditing worker compliance with Walmart’s procedures. *Id.* at *8-*10. Similarly here, DirecTV conducted extensive supervision to ensure that the Installers performed up to DirecTV’s expectations and followed DirecTV’s rules.

Moreover, the high frequency of communication between DirecTV and AIS further evidences the control DirecTV had over the Installers. In *Lemus v. Timberland Apartments, LLC*, 2011 WL 7068078 (D. Or. Dec. 21, 2011), a construction worker alleged he was jointly employed by the developer overseeing the construction project he worked on, and the District Court of Oregon found the developer’s daily communication with the framing company who

1 hired the worker led “to much more pronounced control.” *Lemus*, 2011 WL 7068078 at *1-*2,
 2 *13.

3 The fact that DirecTV communicated to AIS, rather than directly to the Installers, does
 4 not negate that DirecTV was supervising the Installer’s work. In *Torres-Lopez*, the Ninth Circuit
 5 specifically rejected the district court’s finding that the control exercised by the grower alleged to
 6 be a joint employer was insignificant because the grower communicated to the labor contractor
 7 rather than the workers. 111 F.3d at 643. The court made clear “that indirect control as well as
 8 direct control can demonstrate a joint employment relationship.” *Id.* Accordingly, DirecTV’s
 9 ongoing supervision of Installers through closely tracking and communicating with AIS
 10 regarding their performance weighs in favor of finding DirecTV was a joint employer.

11 b. DirecTV compelled Installer compliance with its rules

12 DirecTV relied on its diligent tracking of Installers to enforce compliance with
 13 DirecTV’s standards – primarily through disciplining Installers and AIS for failing to meet
 14 expectations. To compel Installers and AIS to perform as needed, DirecTV used a proverbial
 15 carrot and stick. As a carrot, DirecTV offered bonuses to AIS of \$6.00 per completed Work
 16 Order when Installers at AIS received a companywide Post-call Score above a certain threshold.
 17 See Ex. T, Letter from DirecTV to “Contracting Partner,” dated March 5, 2012, DOL 001528
 18 (Outlining “incentive plan to reward excellent customer service as measured by the post call
 19 survey results.”). However, DirecTV’s primary means to force acceptable performance by the
 20 Installers was disciplining underperformance.

21 DirecTV imposed fines called “chargebacks” each week when Installers failed to meet
 22 certain requirements, such as charging AIS \$50 whenever an Installer failed to arrive during the
 23 specified appointment window. Ex. B, DirecTV Contract at DTV 000318. In *Scantland*, cable
 24 installers alleged they were employees under the FLSA of an installation company who
 25 classified the workers as independent contractors. *Scantland*, 721 F. 3d at 1310. The Eleventh
 26 Circuit found “chargebacks” similar to those here to be “more consistent with disciplining
 27

employees,” because the fines did not correlate to the actual cost of damages to the alleged employer. *Id.* at 1316.

DirecTV went beyond just imposing chargebacks to discipline the Installers. DirecTV simply stopped providing work to Installers who performed too poorly on its metrics. DirecTV called this placing the Installers on “forced time off,” and it served as a powerful deterrent against underperformance since DirecTV was the only source of work for the Installers. Ex. F, Mastin Depo at 56:22-58:21 *and* 59:12-61:22; Ex. CC, E-mail exchange, dated November 23, 2011, DTV e0139105-106 (DirecTV management discussing AIS’s attempt to schedule Installers DirecTV had placed on forced time off). According to DirecTV’s Regional Director Marc Mastin, this meant that DirecTV is “not going to provide [the Installer] work for a period of time.” Ex. F, Mastin Depo at 58:4-5. Since Installers at AIS received all their work from DirecTV, this had the effect of placing the individual on unpaid leave. In fact, when AIS scheduled an Installer who was supposed to be on forced time off for performance issues, DirecTV increased the suspension for that Installer, because AIS was “not in a position to be making ‘executive decisions’” about when an Installer could be taken off unpaid leave. Ex. DD, E-mail exchange, dated November 23, 2011, DTV e0139107-110; Ex. F, Mastin Depo at 62:23-63:11.

In *Lemus v. Timberland Apartments, L.L.C.*, the District Court of Oregon found such authority was “a sanction somewhat equivalent to firing” that weighed in favor of finding joint employment where, as here, the employees relied on the putative joint employer for their work. *See Lemus*, 2011 WL 7068078, at *10. Here, DirecTV exercised this authority and refused to provide work to Installers who it deemed to be underperformers. So, it cannot be genuinely disputed that DirecTV exercised significant supervisory control over the Installers – by closely tracking Installer performance and acting on metric data to induce Installers to follow DirecTV’s rules.

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1 c. DirecTV controlled the manner in which Installers performed their work

2 DirecTV set the rules on how Installers work was to be performed, and mandated that
 3 Installers comply with these protocols. *See* Ex. M, DirecTV Installer Manual. DirecTV imposed
 4 these standards on all Installers – whether they worked as a DirecTV employee or worked for
 5 DirecTV through an outside entity like AIS. Ex. K, Baker Depo at 22:3-8. AIS President and
 6 Defendant Ramon Martinez testified that AIS’s role was to simply pass on DirecTV’s rules to
 7 the Installers: “[t]here’s a standard installation practice and policy guideline, and it’s all directed
 8 by DirecTV. They tell us exactly how they want to see the work performed.” Ex. U, Martinez
 9 Depo at 51:2-51:8.

10 DirecTV controlled Installer appearance, ensuring the Installers appear to DirecTV
 11 customers to be DirecTV employees. DirecTV requires Installers who work for AIS to “wear no
 12 less than the approved DIRECTV shirt and cap while performing” their duties, with such
 13 clothing to be purchased from DirecTV at AIS’s expense. Ex. B, DirecTV Contract at DTV
 14 000309. The Installers must wear identification badges that “shall indicate that the installer is an
 15 authorized DIRECTV installer.” Ex. B, DirecTV Contract at 308; *see also* Ex. M, DirecTV
 16 Installer Manual at DTV 004214 (“A picture ID card identifying the installer as a DIRECTV
 17 representative should be in plain view”). DirecTV mandates that Installer’s vehicles must be
 18 “new or like new and damage free,” and “identify the vehicle as “a service provider for
 19 DirecTV.” Ex. B, DirecTV Contract at DTV 000307-308; Ex. M, DirecTV Installer Manual at
 20 DTV 004214. Whether intentional or not, such requirements over Installer appearance would
 21 cause a reasonable DirecTV customer to believe the Installers are DirecTV employees.

22 DirecTV’s procedural rules also imposed minute specifications on how an Installer is to
 23 perform their work. These rules require, *inter alia*, that Installers provide a minimum twenty-
 24 minute education session to each customer on the DirecTV equipment on topics including caring
 25 for the satellite dish in inclement weather to teaching the customer how DirecTV interacts with
 26 the customer’s stereo equipment. Ex. M, DirecTV Installer Manual at DTV 004231-4235.
 27 DirecTV requires this tutorial go for a minimum of twenty minutes. *Id.* The service guidelines

are specific enough to require that Installers use “DirecTV approved RG-6 coaxial cable with a max loop resistance at 100 feet of 2 ohms or less.” Ex. M, DirecTV Installer Manual at DTV 004226. In *Solis v. Cascom, Inc.*, 2011 WL 10501391 (S.D. Ohio Sept. 21, 2011), the Southern District of Ohio, found Cascom, an installation service company, to be an employer of cable installers and cited as support for its holding that Cascom required the cable installers follow “Cascom’s detailed instructions for installation methods and work practices,” as well as wear shirts and vehicles with Cascom’s logo. *Cascom, Inc.*, 2011 WL 10501391 at *5. Additionally, in *Scantland*, the Eleventh Circuit found that the installation company exhibited control over cable installer’s by “tightly regulated” their work through tracking cable installer’s work and “left the [cable installers] with no discretion in how to approach a particular job” by specifying exactly how work was to be performed and closely tracking the installers. There is no genuine dispute that DirecTV exercises similar control over Installer appearance and how the Installers executed their duties, and such tight control weighs in favor of joint employment.

d. DirecTV determined Installer’s work location

It is undisputed that DirecTV exhibited additional control over the Installer’s conditions of employment by directing where Installers performed their work. On a general level, DirecTV determined where Installers worked because Installers exclusively worked for DirecTV – meaning Installers could only work where they were assigned by DirecTV. DirecTV exhibited specific control through its assignment of Work Orders. DirecTV prepared Work Orders each day in its database, and assigned the Work Orders to available installers in a given area – whether that installer worked internally for DirecTV or for a contractor like AIS. Ex. K, Baker Depo at 21:17-23. DirecTV assigned these Work Orders to specific Installers. *See, e.g.*, Ex. G, Work Order, DOL 3498 (Tech ID in the upper-right corresponds to specific Installer).

Although the parties dispute the extent to which AIS altered DirecTV’s initial assignment of which Installer would handle which Work Orders, there is no dispute that AIS had to receive approval from DirecTV before being able to change which Installer would handle a given Work Order. *See, e.g.*, Ex. H, E-mail exchange dated November 4, 2011, DTV e0143795-796 (AIS

1 requesting Work Order be moved to different Installer and follow-up on that request).³ DirecTV
 2 did not simply grant this approval as a matter of course. In one instance, DirecTV Regional
 3 Director Marc Mastin denied AIS's request to re-assign a Work Orders to an Installer because
 4 DirecTV had placed the Installer on forced time off due to performance issues. Ex. DD, E-mail
 5 exchange, dated November 23, 2011, DTV e0139107-110. Mastin also punished both AIS and
 6 Installer for trying to route the suspended Installer by increasing his forced time off by one day,
 7 because AIS "should not be making decisions to bring [Installers] in without receiving specific
 8 direction and permission from us." *Id.* DirecTV cannot dispute that it broadly determined where
 9 Installers worked because DirecTV provided all of the work to the Installers. In addition, there is
 10 no genuine dispute that DirecTV specifically managed and approved the assignment of Work
 11 Orders to Installers.

12 DirecTV had dominant authority over the Installers' conditions of employment –
 13 determining how and where Installer work is done, as well as rigorously evaluating and
 14 supervising the performance of the Installers. The control that DirecTV exercises over the
 15 Installers weighs heavily in favor of finding, as a matter of law, that DirecTV is a joint employer.

16 2. *DirecTV controlled the Installers' schedule*

17 DirecTV went beyond controlling how and where Installers worked, and effectively
 18 dictated when the Installers' worked and how many Installers should be working at AIS. The
 19 Ninth Circuit has held that an employer's power to direct the overall schedule, including when
 20 and how much work must be done, exhibited control over working conditions supporting a
 21 finding joint employment. *See Bonnette*, 704 F. 2d at 1470; *Torres-Lopez*, 111 F.3d at 642.

22 Here, Installers received work only from DirecTV, and DirecTV limited the hours
 23 Installers could perform that work by providing Work Orders to Installers in specified time
 24

25 ³ DirecTV also freely moved Work Order assignments between DirecTV in-house installers and
 26 the Installers at AIS as needed. Ex. EE, E-mail exchange dated September 7, 2011,
 27 DTVe0114958 (moving Work Orders from DirecTV in-house to AIS); and Ex. I, Guttormsen
 Depo at 36:10-21 (DirecTV has moved Work Orders from AIS to DirecTV in-house installers).

1 windows – either in the morning, afternoon, or, during the summer, in the evening from 4 p.m. to
 2 8 p.m. Ex. K, Baker Depo at 56:15-20. In *Lemus*, the Central District of Oregon recognized that
 3 limiting work hours demonstrated indirect control over employees. *Lemus*, 2011 WL 7068078 at
 4 *11.

5 DirecTV also demonstrated direct control over Installers' schedule in numerous ways.
 6 DirecTV required Installers to be at the site of their first Work Order by 8 a.m. Ex. F, Mastin
 7 Depo at 27:1-14; and Ex. J, E-mail exchange dated November 11-13, 2013, DTV e0172877-
 8 e0172879. DirecTV also directed Installers change their days and hours worked during certain
 9 periods. In the summer, DirecTV required at least ten percent of the Installers at AIS be
 10 available from 4 p.m. to 8 p.m. Ex. K, Baker Depo at 56:24-57:3. In addition, during busy
 11 periods, DirecTV required Installers move from a five-day per week to a six-day per week
 12 schedule during the busy periods. *See, e.g.*, Ex. L, E-mail dated July 1, 2011 DTV e0128506
 13 (DirecTV Regional Director Mastin directing AIS management that "[w]e do need your entire
 14 staff to begin working a 6th day starting on Tuesday.").

15 DirecTV further showed their power over Installers' schedules by wielding authority over
 16 whether to approve or deny time off requests from Installers. As with much of DirecTV's other
 17 authority, this did not exist just on paper, as DirecTV denied requests for time off. In one
 18 instance, AIS requested that DirecTV give an Installer the next day off from DirecTV
 19 assignments to receive additional training. DirecTV refused because it already had prepared a
 20 fully day of work for the Installer. Ex. FF, E-mail exchange dated April 29, 2012, DTV
 21 e0125683 (DirecTV Field Operations Supervisor Joshua D. Dart denying request); *see also* Ex. I,
 22 Guttormsen Depo at 38:7-39:13 (DirecTV required two weeks' notice for any time off request).
 23 On another occasion, AIS requested that DirecTV allow an Installer to take off New Year's Eve
 24 and New Year's Day, but DirecTV Operations Manager Dustin Dunlap denied the time off,
 25 reminding AIS that he "sent out an email a while back when we stopped accepting holiday time
 26 off requests." Ex. GG, E-mail exchange dated December 13, 2011, DTV e0130876. So it was
 27 DirecTV, not AIS, who had ultimate authority over the days and hours worked by the Installers.

1 AIS simply acted as a conduit, passing along to the Installers what hours and days DirecTV
2 assigned to them, and whether or not DirecTV approved their time off.

3 DirecTV had control over not only when Installers worked, but how many Installers
4 worked at AIS. In April 2014, DirecTV needed AIS to increase Installer staffing from twenty to
5 thirty individuals. DirecTV Regional Directors Marc Mastin made clear to AIS that getting
6 staffing levels up “is huge for us.” Ex. P, E-mail exchange dated April 15, 2014, DTV
7 e0172479-172480. In June 2013, when DirecTV again needed staffing from AIS, Mastin told
8 AIS that their “lack of delivery on staffing...will kill my business.” Ex. HH, E-mail exchange
9 dated June 28, 2013, DOL Martinez 0057. Conversely, in November 2012, DirecTV determined
10 that AIS was overstaffed. DirecTV manager Rich Heddon told AIS that he did “not have enough
11 work” for the current number of Installers at AIS. Ex. O, E-mail Exchange dated November 17,
12 2012, DOL Martinez 0025-27.

13 In *Torres-Lopez*, 111 F.3d at 642, the Ninth Circuit recognized that alleged employer
14 Bear Creek Farms’ power to direct the overall schedule of the farmworkers, including when and
15 how much work must be done, exhibited control over working conditions. DirecTV wields
16 similar authority here over setting when and how many Installers worked at AIS, and this weighs
17 strongly in favor of finding DirecTV to be a joint employer.

18 3. *Installers provide integral work to DirecTV on a piece rate basis that required*
19 *no special skills and provided no opportunity for profit or loss*

20 DirecTV cannot plausibly dispute that Installers provided integral labor to DirecTV.
21 *Torres-Lopez*, 111 F.3d at 644. Courts elsewhere have recognized that “there is no question that
22 the installation of cable systems is an integral part” of the business of a television provider like
23 DirecTV. *See Keeton v. Time Warner Cable, Inc.*, 09–CV–1085, 2011 WL 2618926 at *6 (S.D.
24 Ohio July 1, 2011) (analyzing potential employment of installers by Time Warner). In *Keeton*,
25 the Southern District of Ohio found the integral nature of the installer’s work “indisputably
26 weighs in favor of finding that an employment relationship exists.” *Id.* Without installers to
27

1 install satellite television equipment, DirecTV would have no customers and no revenue from
2 customers purchasing cable television from DirecTV.

3 The nature of the work performed by the Installers also weighs in favor of finding joint
4 employment, as the Installers performed piece work that required no special skills. *Torres-*
5 *Lopez*, 111 F.3d at 644. According to Ramon Martinez, AIS has hired persons with no prior
6 experience who worked at the Gap to serve as Installers. Ex. U, Martinez Depo at 39:4-14.
7 Once hired, the Installers typically underwent four to five weeks of training. Ex. U, Martinez
8 Depo at 40:24-41:1. This is identical to the installer background in *Cascom*, and there the
9 Southern District of Ohio rightly held that being able to train people with no prior experience to
10 be cable installers in six weeks demonstrated that the position required no special skills.
11 Installers also have no opportunity to exercise any managerial skill to realize any profit or loss –
12 the Installers had work assigned to them by DirecTV, who determines how much piecework
13 Installers could perform each day. Like the farmworkers in *Torres-Lopez*, who could only earn
14 more money by picking more cucumbers, the Installers could not use any managerial skill to earn
15 any profit. *Torres-Lopez*, 111 F.3d at 644.

16 Taken together, these factors powerfully demonstrate that the dependence Installers had
17 on DirecTV and vice versa, as the Installers performed piecework integral to DirecTV that was
18 part of DirecTV's line of production.

19 *4. DirecTV imposes all hiring and eligibility requirements*

20 It is undisputed that DirecTV sets all of AIS's hiring standards for Installers, as well as
21 imposing other prerequisites before an Installer can begin receiving work. To be hired as an
22 Installer at AIS, an applicant was required to pass a drug test and background check. Ex. U,
23 Martinez Depo at 38:19-23. AIS only imposed this screening because it was mandated by the
24 contract with DirecTV. See Ex. U, Martinez Depo at 44:11-18; Ex. B, DirecTV Contract at
25 DTV000307. Not only did DirecTV require AIS to screen all of its applicants, AIS had to use
26 vendors approved by DirecTV. Ex. B, DirecTV Contract at DTV000307. DirecTV also
27 determined which substances and which prior crimes would fail the background checks and drug

1 tests. Ex. U, Martinez Depo at 45:10-16. According to AIS President Ramon Martinez, passing
 2 these screenings was the only requirement to be hired as an Installer. Ex. U, Martinez Depo at
 3 39:9-11. In *Carrillo*, Walmart imposed a similar requirement that its contractor “utilize only
 4 such workers...whose character and background have been vetted,” which the court cited in
 5 deciding Walmart had sufficient power over hiring to weigh against finding Walmart was not a
 6 joint employer. 2014 WL 183956, at *7-*8. DirecTV’s screening requirements demonstrate that
 7 AIS simply functioned as an intermediary imposing DirecTV’s hiring rules on the Installers.

8 DirecTV also required the Installers be certified before they could start working. The
 9 DirecTV Contract mandates that Installers at AIS receive two certifications, one of which is
 10 designed by DirecTV. Ex. U, Martinez Depo at 39:23-40:20 and 42:12-22; Ex. N, King Depo at
 11 74:24-75:4. As with the hiring pre-requisites, these certifications are imposed on Installers by
 12 DirecTV, not AIS. So once Installers are hired, they must master training materials provided by
 13 DirecTV to complete certifications required by DirecTV before they can start receiving work
 14 from their only source – DirecTV. Ex. U, Martinez Depo at 43:19-44:5; Ex. N, King Depo at
 15 76:7-25. Therefore, every step that must be accomplished before an Installer can be hired and
 16 start receiving work comes from DirecTV.

17 *5. Installers worked exclusively and permanently for DirecTV*

18 As well-stated by the Eleventh Circuit in *Scantland*, “long tenure, along with control, and
 19 lack of opportunity for profit, point strongly toward economic dependence.” 721 F.3d at 1319.
 20 Here, DirecTV required that Installers at AIS work only for DirecTV, five or six days per week.
 21 Installers could not move freely between DirecTV and other cable companies. These Installers
 22 worked for DirecTV on an at-will basis until they quit or were terminated. According to AIS’s
 23 work records, Installers performed work for DirecTV over several years. *See* Declaration of
 24 Michael Hoffman in Support of Secretary’s Motion for Partial Summary Judgment. This was
 25 “similar to an at-will employment arrangement,” just like the installers in *Cascom*, and the Court
 26 should find, just as in *Cascom*, that such an arrangement weighs in favor of DirecTV being a
 27 joint employer of the Installers. *Cascom, Inc.*, 2011 WL 10501391 at *6.

1 6. *Installers had a permanent relationship only with DirecTV, not AIS*

2 The Installers moved from Lumin, AIS's predecessor, to AIS, to Next Solutions, with no
3 evidence of any material change to the terms of their employment. When AIS went out of
4 business on October 30, 2014, the Installers' began working *the next day* for Next Solutions, in a
5 change DirecTV management called "just operating under a different name." Ex. E, E-mail
6 exchange dated October 10-13, 2014, DTV e0200777. That is because these entities are no more
7 than "labor contractors [that] are interchangeable and lack autonomy, and that actual control over
8 the employees comes from an entity that operates above the labor contractors." *Carrillo*, 2014
9 WL 183956 at *12. The free movement of Installers between entities, along with the Installers'
10 permanent relationship with DirecTV, shows that actual control of the Installers came from
11 DirecTV.

12 As further evidence that DirecTV had actual control, the DirecTV Contract was not the
13 product of negotiation between DirecTV and AIS, but was instead the form contract used by
14 DirecTV around the country. Like the contract between the farm labor contractor and grower in
15 *Torres-Lopez*, the DirecTV Contract was "standard for the industry and involved little
16 negotiation." 111 F.3d at 643. That is made clear by the contract between DirecTV and another
17 contractor in California, which is *entirely identical* to the DirecTV Contract with AIS, including
18 fine amounts. Ex. II, DirecTV, Inc. Services Provider Agreement between DirecTV and Modern
19 Day Satellite, dated July 29, 2009. DirecTV's intermediaries – be they Lumin, Inc., AIS, or
20 Next Solutions – or no more than middlemen, operating on terms set by DirecTV.

21 7. *DirecTV had power over firing*

22 The only information used by AIS and DirecTV to evaluate Installers was the
23 individual's performance on DirecTV's metrics. As a result, Defendant and AIS President
24 Ramon Martinez testified that he relied on DirecTV's performance data when deciding to fire
25 Installers. Ex. U, Martinez Depo at 27:9-11. The Ninth Circuit made clear in *Torres-Lopez*, that
26 "indirect control as well as direct control can demonstrate a joint employment relationship" and
27

1 DirecTV exhibited such control by providing the information which determined whether
 2 Installers would be fired. 111 F.3d at 643.

3 8. *DirecTV impacted Installer pay*

4 DirecTV did not directly pay the Installers, but the undisputed evidence shows that, as a
 5 matter of economic reality, DirecTV impacted Installers' rate and method of pay in two
 6 important ways.

7 First, DirecTV unilaterally set the piece rate it paid AIS. The Second Circuit was faced
 8 with a similar scenario in *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132,
 9 144-45 (2nd Cir. 2008). In *Barfield*, a nursing assistant was directly employed and paid by a
 10 referral agency, but worked only at Bellevue hospital, and alleged she was jointly employed by
 11 Bellevue. *Id.* at 135. Bellevue paid the referral agency who then paid the nursing assistant for
 12 her work. *Id.* at 144-45. The Second Circuit ruled that Barfield still "exerted some control over
 13 [the nursing assistant's] pay" because "the hourly rate Bellevue paid the referral agencies
 14 effectively set a cap on the hourly rate that the agencies would pay" the nursing assistant. *Id.*
 15 DirecTV also effectively capped Installer pay because AIS depended on DirecTV for all revenue
 16 to pay the Installers.

17 DirecTV also influenced Installer pay because AIS paid their Installers bonuses if the
 18 Installers performed well on the metrics that DirecTV used to decide whether to give AIS
 19 bonuses. For example, if AIS's Installers had a companywide score on the post-installation
 20 survey called the Post-call Score of 96 or higher, AIS received a \$6.00 bonus companywide for
 21 all Work Orders in the month. Ex. T, Letter from DirecTV to "Contracting Partner," dated
 22 March 5, 2012, DOL 001528. So AIS gave each Installer an incentive of \$4.00 per work order to
 23 achieve the same score. See Ex. W, E-mail dated January 23, 2013, DOL 004832. AIS also
 24 gave a report each week to all the Installers detailing how much each installer had earned or lost
 25 based on their Post-Call Score for the month so far:

Rank	Name	# Of Post Calls	Average Score	Overall Influence	ID Badge	On Time	Equipmnt Working	Fully Educate	Quality of Work	Professionalism	Total Potential Incentive	Lost Potential Incentive
1	Stephen Myron	12	100.00	48	100.00%	100.00%	100.00%	10.00	10.00	10.00	\$48.00	\$0.00
2	Robert Meek	15	98.27	34	100.00%	100.00%	100.00%	9.67	9.73	9.67	\$60.00	\$0.00
3	Gary Michaels	9	98.89	26	100.00%	100.00%	100.00%	9.67	9.89	9.89	\$36.00	\$0.00
4	Randy Agustin	13	97.77	23	100.00%	100.00%	100.00%	9.54	9.62	9.62	\$52.00	\$0.00
5	Merle Patterson	6	99.67	22	100.00%	100.00%	100.00%	9.83	10.00	10.00	\$24.00	\$0.00
6	Adam Boynton	5	99.20	16	100.00%	100.00%	100.00%	9.60	10.00	10.00	\$20.00	\$0.00
7	Oleg Katko	7	98.14	15	100.00%	100.00%	100.00%	9.00	10.00	10.00	\$28.00	\$0.00
8	Mark Hanicker	7	97.86	13	100.00%	100.00%	100.00%	9.43	9.71	9.71	\$28.00	\$0.00
9	Austin Carrigan	12	96.50	6	91.67%	100.00%	100.00%	9.75	9.50	9.67	\$48.00	\$0.00
10	Gregg Wood	4	97.25	5	100.00%	100.00%	100.00%	9.00	9.75	9.75	\$16.00	\$0.00
11	Jerry Brogan	1	96.00	0	100.00%	100.00%	100.00%	9.00	9.00	10.00	\$4.00	\$0.00
12	Lucas Anderson	16	95.94	-1	87.50%	100.00%	100.00%	9.38	9.88	9.75	\$0.00	\$64.00
13	Miguel Rocha	11	95.82	-2	100.00%	100.00%	90.91%	9.09	9.45	10.00	\$0.00	\$44.00
14	Damon Irwin	9	95.56	-4	88.89%	100.00%	100.00%	8.89	9.89	9.89	\$0.00	\$36.00

Id. DirecTV also provided AIS up to \$7.00 for every protection plan sold by an Installer at AIS, which caused AIS to offer Installers \$2.00 for each protection plan they sold to a DirecTV customer. Ex. W, Addendum to DirecTV Services Provider Agreement, DOL Martinez 0013-15; Ex. X, E-mail dated July 13, 2011, DOL 004790. Accordingly, DirecTV indirectly controlled Installer pay by setting the ceiling on how much AIS could pay Installers, and by determining whether Installers would receive bonuses from AIS.

9. *DirecTV maintained authority over Installer records*

DirecTV maintained its own records on Installers, and also played a role in AIS's recordkeeping. DirecTV maintained information on when Installers arrived and departed appointments, and extensive metric data on how Installers performed their duties. In addition, DirecTV required AIS to "keep accurate and complete books and records regarding its performance of its obligations under" the DirecTV Contract, such as Installer background checks. Ex. B, DirecTV Contract at DTV000285-286. So DirecTV maintained records of Installers' hours worked, and their performance, as well as requiring AIS to maintain records pertinent to the DirecTV Contract.

10. *Premises and equipment*

One factor identified by the Ninth Circuit in *Torres-Lopez* does not weigh for or against joint employment. *Torres-Lopez*, 111 F.3d at 640. Neither the Installers nor DirecTV invested in the equipment used to do the Installers' work – instead, tools were provided by AIS. Ex. U,

1 Martinez Depo at 91:8-20. In addition, the Installers did not perform their duty on the premises
 2 of property owned by DirecTV. However, the established facts show that every other factor
 3 identified by the Ninth Circuit to analyze joint employment weighs towards finding DirecTV
 4 jointly employed the Installers.

5 **IV. CONCLUSION**

6 There is no genuine dispute over any of the material facts which establish that DirecTV
 7 exercised pervasive authority over the Installers just like any other employer – DirecTV set the
 8 hiring requirements; provided the work; determined how, when, and where the work would be
 9 performed; decided who would perform the work; supervised and evaluated the Installers;
 10 capped Installer pay; and disciplined Installers. It is not surprising that DirecTV would exercise
 11 such control over the Installers, because the work they did was absolutely integral to DirecTV's
 12 business. Yet DirecTV chose to shirk its responsibility to ensure that the Installers were paid as
 13 required by the FLSA. Instead, DirecTV found an entity, AIS, who would supply cheap
 14 manpower, and would cede control to DirecTV. The Secretary files this motion for partial
 15 summary judgment to finally hold DirecTV jointly and severally liable for violations of the
 16 FLSA related to the Installers, and any back wages due. As a matter of law, the Secretary is
 17 entitled to a finding from the Court that DirecTV did jointly employ the Installers.

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 19 Dated: March 19, 2015

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